

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK MCQUEEN,

Defendant-Appellant.

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UNPUBLISHED

July 23, 2013

No. 306317

Macomb Circuit Court

LC No. 2010-001608-FC

Before: BORRELLO, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial conviction of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a); MCL 750.520b(2)(b). He was sentenced as a fourth habitual offender, MCL 769.12, to 25 to 40 years in prison. We affirm.

Defendant first argues that he received ineffective assistance of counsel. We disagree. Because defendant did not move for a new trial or *Ginther*<sup>1</sup> hearing, and his motion to remand was denied, our review is limited to mistakes apparent on the record. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

The United States and Michigan Constitutions guarantee criminal defendants the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Meissner*, 294 Mich App 438, 459; 812 NW2d 37 (2011). “To establish ineffective assistance of counsel, defendant must first show that (1) his trial counsel’s performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.” *People v Uphaus*, 278 Mich App 174, 185; 748 NW2d 899 (2008).

Effective assistance of counsel is presumed, and counsel is given “wide discretion in matters of trial strategy[.]” *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Declining to raise objections can often be consistent with sound trial strategy, and effective

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

assistance does not require trial counsel to make futile objections. *People v Unger*, 278 Mich App 210, 242, 256-257; 749 NW2d 272 (2008). Defendant must overcome a strong presumption that counsel's actions were the product of sound trial strategy. *People v Brown*, 294 Mich App 377, 388; 811 NW2d 531 (2011).

Defendant first claims that, on direct and redirect examination, his attorney failed to object when Margo Moltmaker, a forensic interviewer at the Macomb County Child Advocacy Center (Care House), testified about information that the 11-year-old victim provided during her forensic interview. In particular, defendant claims that counsel should have objected to Moltmaker's testimony that the victim provided the same information about the alleged assault more than once and promised to be truthful.

During direct examination, Moltmaker answered, in the affirmative, several closed-ended questions, including whether the victim was "able to open up and talk to you that day," whether she was "able to tell you where on her body she was touched," "when it happened approximately," "who touched her," and whether she "told you who, what, where, when, and why." Asked by the prosecutor whether defendant had ever told the victim why he was touching her, Moltmaker responded, "He indicated [to the victim] that he was touching her because he had been touched himself." While this answer constituted hearsay, and was not admissible under any exception, defendant cannot establish ineffective assistance of counsel. The content of the statement duplicated the victim's own testimony, which the jury had already heard, and counsel may have strategically declined to object, knowing that even a sustained objection would have had no practical effect, as the jurors would have been admonished not to consider the statement from Moltmaker but would not have received a similar instruction with respect to the identical testimony from the victim. Appellate courts will not second-guess questions of trial strategy. *Odom*, 276 Mich App at 415. Relatedly, defendant cannot show that he was prejudiced by any error because the jury had already heard the victim's own testimony concerning what defendant had told her, which was not hearsay. MRE 801(d)(2).

Moltmaker also testified that she explained to the victim that one of the "ground rules" of the interview was that subjects "promise that they'll only talk to [her] about things that are true," and the victim made that promise. To the extent this statement was offered to prove its truth, it was admissible as evidence of the victim's then-existing state of mind. MRE 803(3); see also *People v Coy*, 258 Mich App 1, 13-14; 669 NW2d 831 (2003). The victim's verbal promise to Moltmaker was evidence of her intent to tell the truth during the interview. As noted, counsel is not required to make futile objections. *Unger*, 278 Mich App at 256. Moreover, even assuming *arguendo* that the statement was not admissible, counsel likely recognized that objecting would have appeared unduly combative. We cannot conclude that counsel's failure to object fell below an objective standard of reasonableness under the prevailing professional norms. See *Uphaus*, 278 Mich App at 185.

Defendant argues, in his supplemental brief filed *in propria persona*, that trial counsel rendered ineffective assistance by failing to consult with him before trial. He also argues that appellate counsel's failure to raise this issue constituted ineffective assistance.

Defendant had the same appointed trial attorney nearly from the inception of this case. Defendant was arraigned on April 26, 2010, at which time he requested new court-appointed

counsel, and an order was entered the next day consistent with that request. Defendant's second attorney represented him through his jury trial, which ended with his conviction on July 22, 2011. The claim that defendant's trial counsel did not consult with him in the 15 months between his arraignment and jury trial is facially dubious. Indeed, defendant admits on appeal that he did discuss the case with his attorney, but was dissatisfied when he was told to "shut up," "that makes no sense," and "I'm the lawyer, I know what's best." Indeed, when defendant's attorney asked him on the record whether they had "talked about this case a number of times," defendant answered, "Yes."

Attorneys must consult with their clients on "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal," *Florida v Nixon*, 543 US 175, 187; 125 S Ct 551; 160 L Ed 2d 565 (2004) (citation omitted), but "the lawyer has—and must have—full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval," *Taylor v Illinois*, 484 US 400, 418; 108 S Ct 646; 98 L Ed 2d 798 (1988). Because defendant was asked on the record whether he chose to waive his right to testify and has not identified with specificity any other issue about which he was not consulted, he cannot establish constitutionally deficient performance by his attorney in this regard.

Nor can he establish prejudice. Trial counsel competently advocated on defendant's behalf, attempting to cast doubt on the victim's credibility, and defendant has offered no reason to believe that the outcome of the trial would have been different had the attorney-client relationship been more harmonious. No prejudice is presumed in this case. See *People v Vaughn*, 491 Mich 642, 671; 821 NW2d 288 (2012) (prejudice is presumed only when counsel was totally absent, prevented from assisting the accused during a critical stage of the proceeding, or burdened by an actual conflict of interest). For the same reasons, defendant's ineffective assistance of appellate counsel argument, based on appellate counsel's failure to raise the preceding argument on appeal, lacks merit.

Defendant also argues that trial counsel "failed to object to the perfunctory investigation of this case," and "failed to more effectively question the prosecution[']s witnesses . . ." "Decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy," *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012), and it follows that the strategic minutiae of those questions rest within the attorney's discretion. Defendant does not identify in what way counsel could have improved his questions, and our review of the record shows that counsel professionally and rigorously cross-examined each of the prosecution's witnesses, including the victim. Counsel also argued to the jury during closing argument that the victim had created a "tangled web" of "lies," and that the slight damage to her hymen could have been caused by scratching. The crux of defendant's argument is that the prosecution presented a "sketchy description[]" of the assault, but trial counsel ably teased out the weaknesses of the prosecution's case-in-chief, and the ultimate judge of witness credibility is the trier of fact. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). The "perfunctory investigation" to which defendant argues his trial counsel should have objected concerns the weight of the evidence, which was another question for the jury to resolve. Accordingly, defendant has shown neither deficient performance nor prejudice concerning this issue.

Defendant argues that trial counsel should have objected to the audio recording of the telephone conversation between the victim and defendant under MRE 804(b)(6) and MRE 404(b). MRE 804(b)(6) provides for the *inclusion* of statements by a declarant made unavailable by the opponent. See *People v Jones*, 270 Mich App 208, 212-213; 714 NW2d 362 (2006). The audio recording was not hearsay because it was a statement of a party-opponent. See MRE 801(d)(2); *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002). MRE 804(b)(6), therefore, is inapplicable. MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

This is a “rule of inclusion” rather than exclusion. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). Because the audio recording was not introduced as character evidence, MRE 404(b) does not apply. Counsel is not required to make futile objections. *Unger*, 278 Mich App at 256.

Defendant further argues that trial counsel failed to call Demarcus, the victim’s brother, as a witness, and that Demarcus would have provided “valuable information” helpful to the defense. Defendant does not indicate what that information would have been, and the only person who testified regarding Demarcus’s whereabouts during the assault was the victim, who said that he was asleep in the living room during the assault. In any event, “[d]ecisions regarding to call or question witnesses are presumed to be matters of trial strategy.” *Russell*, 297 Mich App at 716. Even if Demarcus had been called, and even if his testimony contradicted the victim’s, the resulting conflict in the testimony would have been for the jury to decide. Without identifying with particularity what Demarcus’s testimony would have included, defendant cannot establish that he was prejudiced by counsel’s decision not to question Demarcus.

Defendant argues that trial counsel should have filed a motion to suppress his prior conviction “so that he could testify [o]n his own behalf.” As discussed hereinafter, defendant waived his right to testify, and none of his prior convictions was entered into evidence. Accordingly, he cannot demonstrate prejudice with respect to this issue.

He also contends that trial counsel failed to meet with him to “prepare for trial” and that he “tried many times to reach out to counsel, but to no avail.” While the bulk of this argument was addressed previously, on the narrower question concerning counsel’s alleged failure to meet with defendant, defendant’s argument is similar to that raised in *People v Dixon*, 263 Mich App 393; 688 NW2d 308 (2004). In *Dixon*, 263 Mich App at 402-403, the defendant charged that “he only had a brief opportunity to meet with his attorney before the preliminary examination,” but this Court found that defense counsel nevertheless “had been apprised of the relevant facts of the case, and . . . asked the victim questions designed to undermine her credibility and call into question her motivation for accusing [the] defendant of the alleged crimes.” This Court concluded that counsel had “provided defendant with the assistance of counsel guaranteed by the

Sixth Amendment,” and “was not ineffective for failing to meet with [the] defendant for a longer time period before trial.” *Id.* at 404.

As in *Dixon*, defense counsel’s strategy in the instant case was to question the victim’s credibility. While it is not clear how often and for how long defendant’s attorney met with him, it is clear that such meetings took place. Indeed, as noted earlier, defendant acknowledged on the record that he and his attorney had “talked about this case a number of times.” We perceive no error with respect to this issue.

Defendant argues that trial counsel should have objected to the district court’s violation of MCL 766.4, which generally requires the court to hold a preliminary examination no later than 14 days after the district court arraignment. This claim lacks merit because defendant waived arraignment in the district court on April 15, 2010, and the preliminary examination was held on the same day, resulting in defendant being bound over to the circuit court, where he was arraigned on April 26, 2010. Because no procedural rule was violated, there was nothing for defense counsel to object to.

In a related vein, defendant argues that because counsel was appointed immediately preceding his preliminary examination, he was not afforded the opportunity to present a full defense or introduce the testimony of various exculpatory witnesses at the examination. Therefore, defendant asserts that his counsel should have moved to dismiss the charges. We note that a defendant is not entitled to present a full defense at the preliminary examination. Instead, the purpose of a preliminary examination is limited to determining whether probable cause exists to believe that a felony was committed and that the defendant committed it. MCR 6.110(E); *People v Perkins*, 468 Mich 448, 452; 662 NW2d 727 (2003). Even if defendant had presented all the additional evidence that he cites in his supplemental brief, the testimony of the victim,<sup>2</sup> alone, still would have created a conflict in the evidence and a genuine issue concerning defendant’s guilt for resolution by the trier of fact. *People v Abraham*, 234 Mich App 640, 657; 599 NW2d 736 (1999). We perceive no ineffective assistance of counsel in this regard.

Defendant next argues that trial counsel failed to secure his right to have the jury instructed on the lesser-included offense of second-degree criminal sexual conduct (CSC II). We note that defendant waived any instruction concerning CSC II on the record. At any rate, CSC II is a cognate lesser offense of CSC I, and defendant was accordingly not entitled to a CSC II instruction. See MCL 768.32(1); *People v Nyx*, 479 Mich 112, 121-125; 734 NW2d 548 (2007). Because it would have been improper for the trial court to instruct the jury on CSC II, *id.* at 121, defendant cannot show prejudice concerning this issue.

Defendant additionally argues that he was never fully advised of his absolute right to testify and did not knowingly, voluntarily, and intelligently waive that right. He further asserts that trial counsel rendered ineffective assistance by misleading him into not testifying, and by failing to file a motion in limine to exclude evidence of his prior convictions. These unpreserved

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<sup>2</sup> In a prosecution for criminal sexual conduct, “[t]he testimony of a victim need not be corroborated[.]” MCL 750.520h.

claims are reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

"A defendant's right to testify in his own defense arises from the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution." *People v Bonilla-Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011). "Although counsel must advise a defendant of this right, the ultimate decision whether to testify at trial remains with the defendant." *Id.* Michigan law does not require an on-the-record waiver of a defendant's right to testify. *People v Harris*, 190 Mich App 652, 661; 476 NW2d 767 (1991). "The right to testify is not an absolute. It will be deemed waived if the defendant decides not to testify or acquiesces in his attorney's decision that he will not testify. The test is whether the defendant's waiver was made knowingly and voluntarily." *People v Moore*, 164 Mich App 378, 384; 417 NW2d 508 (1987), modified 433 Mich 851 (1989).

After the prosecution rested, defendant and his trial attorney engaged in the following dialogue:

*Mr. Haradhvala (attorney for the defense):* I'm your attorney, correct, on this case?

*The Defendant:* Yes.

*Mr. Haradhvala (attorney for the defense):* All right. And we've talked about this case a number of times?

*The Defendant:* Yes.

*Mr. Haradhvala (attorney for the defense):* And we've talked about the fact that you have the right to testify if you wish to testify?

*The Defendant:* Yes.

*Mr. Haradhvala (attorney for the defense):* And we've talked about the fact that you have the right not to testify if you choose not to testify?

*The Defendant:* Yes.

*Mr. Haradhvala (attorney for the defense):* And I've also explained to you that if you do not testify[,] the prosecutor can't tell the jury, ["H]ey, [defendant] must be guilty of this crime because he's hiding behind his lawyer's petticoats.[""] She can't tell the jury that, do you understand? That she cannot tell the jury you're guilty because you're not testifying[?]

*The Defendant:* Yes.

*Mr. Haradhvala (attorney for the defense):* Based on all of that, have you made a decision whether or not to testify?

*The Defendant:* Yes.

*Mr. Haradhvala (attorney for the defense):* And based on all the pluses and minuses, and pros and cons of testifying, have you now come to the conclusion about testifying or not testifying?

*The Defendant:* Yes.

*Mr. Haradhvala (attorney for the defense):* And can you tell the judge whether or not you are going to testify?

*The Defendant:* No.

*Mr. Haradhvala (attorney for the defense):* You're not going to testify?

*The Defendant:* No.

*Mr. Haradhvala (attorney for the defense):* And this is freely and voluntarily made?

*The Defendant:* Yes.

*Mr. Haradhvala (attorney for the defense):* And it is your decision?

*The Defendant:* Yes.

The record shows that defendant knowingly and voluntarily waived his right to testify, and the record is devoid of any suggestion of coercion or ineffective advice by counsel. Further, even if the waiver was somehow defective, defendant cannot show that any error was outcome determinative. After all, even if defendant had testified, the evidence still would have created a credibility contest for the jury, and defendant advances no specific arguments to establish that his own testimony would have been particularly helpful to the defense. Furthermore, because defendant waived his right to testify, the prosecution did not seek to introduce evidence of his prior convictions. Accordingly, there was no error in counsel's failure to move to exclude such evidence. We find no error requiring reversal.

Affirmed.

/s/ Stephen L. Borrello  
/s/ Kathleen Jansen  
/s/ Michael J. Kelly